

*United States Court of Appeals  
for the Second Circuit*



**APPELLANT'S  
BRIEF**



74-2313

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IN THE  
UNITED STATES COURT OF APPEALS  
FOR THE SECOND CIRCUIT

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UNITED STATES OF AMERICA,

*Appellee,*

*-against-*

NICHOLAS HILDEBRANDT, ANGELO SETJO  
and JAMES DI DOMENICO,

*Defendants-Appellants.*

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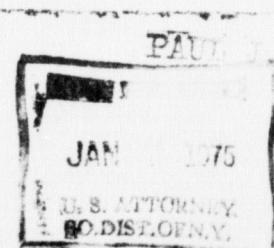
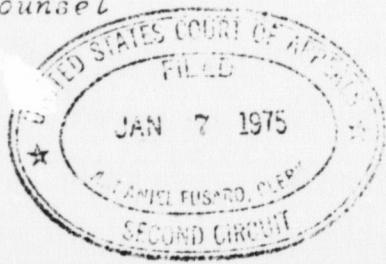
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APPELLANT HILDEBRANDT'S BRIEF

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*In The*

UNITED STATES COURT OF APPEALS

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UNITED STATES OF AMERICA

Appellee

-against-

NICHOLAS HILDEBRANDT, ANGELO SEIJO and  
JAMES DI DOMENICO

Defendants-Appellants

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BRIEF FOR APPELLANT

ISSUE PRESENTED FOR REVIEW

Was the failure of the government to disclose  
a prior felony conviction of its key witness requiring a  
reversal?

Preliminary Statement and Statement  
of the Case

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Defendant-Appellant Nicholas Hildebrandt appeals  
from a judgment of conviction entered on October 1, 1974  
by the United States District Court for the Southern District  
of New York (MacMahon, J.).

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V

The Judgment of the District Court:

- a) Upon a jury's verdict, convicted defendant Hildebrandt on Counts 1, 2, 3, 4 of the indictment;
- b) Sentenced him as follows:

Fifteen years in prison and three years  
special parole on each count to run con-  
currently with each other.

Defendant Hildebrandt and the indictment

The indictment in this case, returned by the grand jury on June 14, 1974 contained six counts, against four defendants. Only counts one through four contain charges against defendant Hildebrandt.

Count one charges that defendant Hildebrandt, Seijo DiDomenico, and Torres conspired to distribute and possess with intent to distribute certain narcotic drugs (herein).

Counts two, three and four charge that defendant Hildebrandt and others participated on three separate occasions in the sale of certain narcotic drugs (herein). Torres entered a plea of guilty to count 1 and served as the prosecution's key witness. It is the government's failure to fully disclose a past felony conviction of Torres, upon which this appeal is based.

Statement of Facts

The facts, presented in a light most favorable to the government are that in early April, 1974 Tom Frano, a government informer (T40) approached Torres and asked if he could get him some narcotics (T 83). Torres then approached DiDomenico at which time DiDomenico told Torres that Frano had approached him also and that he would attempt to get Frano the drugs (T 83).

Subsequently, according to Torres, DiDomenico introduced Torres to Hildebrandt. Significantly, once the introduction is made it is Torres, and only Torres, who had any contact with Hildebrandt. The method of obtaining the drugs for sale, vis-a-vis defendant Hildebrandt was always the same. Torres would meet H. Hildebrandt at a specified time and place and obtain the drugs (T 87, 91, 108). No one other than Torres, had any transactions of any kind with Hildebrandt, nor was Hildebrandt caught with any drugs or cash there was no testimony that the said Hildebrandt participated in the sale except for the testimony of Torres. (There was some peculiar testimony by a N.Y.C. detective, presumably introduced in the nature of a confession that Hildebrandt's "source of supply was Dominick Lessa" (175). There was no admission that the heroin in evidence was Hildebrandt's.

Moreover, the detective claimed this statement was made on June 6, though it was dated June 5, at a time when the government's own witness admitted that he could smell alcohol on defendant's breath and there was other evidence that he was inebriated.)

Torres was the key to the government's case against Hildebrandt. It was his uncorroborated testimony that hildebrandt was the source of the heroin that was sold upon which the government made out its case.

Torres, was asked at the trial whether he had ever been convicted of a crime. He answered in the negative. His character was pointed as a young man who had become victimized on drugs while in the Army in Vietnam and who had cured himself of addiction on a methadone program.

This key lie and the government's suppression of his prior record are important factors herein.

It was not until some three and one half months after the trial in the District Court that Assistant United States Attorney Thomas P. Fortuin, submitted an affidavit (hereinafter Fortuin affidavit) stating in substance that (1) Torres had had a prior conviction for possession of marijuana for which he received a suspended sentence and was placed on four years parole (2) That the rap sheet was in government's possession for approximately one month prior to

trial and (3) that the failure of the prosecution to reveal the above information was purely unintentional.

POINT I

The conviction of Defendant Hildebrandt bring totally dependent upon the credibility of Torres. Is a new trial mandated by the failure of the government to inform defense counsel of Torres prior conviction

To side the issue as cryptically as possible, defendant Hildebrandt was convicted on the totally uncorroborated testimony of Leonard Torres, originally a defendant, and subsequently the government's key witness after pleading guilty to the conspiracy count. At the time of trial, defense counsel were erroneously (and concededly unintentionally) informed that Torres "had never been convicted of a crime prior to his arrest in the case." (Fontuin affidavit,).

The use of prior convictions for impeaching the credibility of witnesses has been debated by legal scholars for many years. Rather than trace this history, it is far more important to observe how legislative and quasi legislative bodies have recently responded to this debate.

As recently as April, 1974 the United States Supreme Court approved and sent on to Congress proposed amendments to the Federal Rules of Criminal Procedure, which were to have taken effect on July 1, 1974. Rule 26 (E) of

the proposed amended rules provides:

"*Government witnesses.*—Upon request of the defendant the government shall furnish to the defendant a written list of the names and addresses of all government witnesses which the attorney for the government intends to call in the presentation of the case in chief together with any record of prior felony convictions of any such witness...

(Emphasis supplied).

A second body to wrestle with the importance of prior convictions in impeaching a witness one of the drafters of the proposed Federal Rule of Evidence. The numerous drafts and redrafts of Rule 609 of the proposed Rules (Impeachment by Evidence of Conviction of Crime) are well known to this Court. Equally well known to this Court are the many times it has been called upon to discuss and set guidelines in the use of prior convictions for impeaching the credibility of a witness. See, U.S. v. Palumbo, 401 F.2d 270 (2d Cir. 1968) cert. denied, 394 U.S. 947 (1969). See Also, U.S. v. Costa, 425 F.2d 950 (2d Cir. 1969) cert. denied 398 U.S. 938 (1970).

Regardless of the wording of the final draft of Rule 609, and regardless of how this Court finally reaches the use of prior convictions, one fact remains clear, the use of prior convictions is recognizably one of the most critical tools in impeaching the credibility of a witness.

*In U.S. v. Freeman* 302 F 2d 347, 350 (2d Cir., 1962) this Court in discussing the limits and importance of the use of prior convictions stated:

*"Of course it was proper for the government to bring out on direct examination the criminal record of the witness...Not to have done so waived surely have subjected the prosecution to criticism. The matter of informing the court and jury about information of such clear relevance as the criminal record of a witness called by the prosecution is not something which is to be reserved for the pleasure and strategy of the defense!..*

*United States v. Torres*, 477 F 2d 922 (3th Cir., 1973) is a case very similar to the instant case. In that case the defendant Torres was convicted of possession of certain drugs on the testimony of Lebron a participant in the crime. The defense had been unable to introduce testimony as to a prior conviction. The Court held, in reversing (P. 923)

*"It was crucial to Torres' defense to show that Lebron's testimony was false and that Lebron had reason to lie. It was in Lebron's interest to lie to save himself from prosecution and from revocation of his probation for the prior conviction. If the Court had permitted Torres to introduce Lebron's record, the jury might have disbelieved Lebron's testimony and acquitted Torres. (Emphasis added).*

It is black letter law that the credibility of any witness is a question to be resolved by the jury

U.S. v. Hoffa, 385 U.S. 223, 311 (1967); U.S. v. Taylor, 464 F 2d 240 (2d Cir. 1972); U.S. v. Weinstein, 452 F 2d 704 (2d Cir. 1972) cert. denied, 406 U.S. 917 (1972).

Certainly the instant case is no exception. As has been pointed out earlier, it is the testimony Torres, and only Torres testimony, that link Hildebrandt to any transaction involving narcotics. At page 87 of the trial transcript Torres testified concerning the transaction of early April, that "He (Hildebrandt) gave me the package...At pages 90-91 concerning the transaction during the end of April Torres testified, "So I got there by a 9:30 in the morning and I says "Do you have it yet ? He says "Come back later, about 12 o'clock, and I'll be ready for you." .... So I came back about 12 o'clock, I got package..."

Finally at pages 107-108 Torres testified concerning the transaction of early June:

"So it was about 8:30 or 9 o'clock or so I went to (Hildebrandt's) shop....Nick Hildebrandt and Angelo Seijo came down the stairs and I says, "Do you have it ?"

They said "Yes, we have it"....So Nick handed me the package.

During the first two transactions, no one was present, and no one observed the transaction. In the final transaction, Seijo was present, but although taking the stand, never corroborated Torres story.

Clearly the conviction of Hildebrandt was dependant upon the testimony of Torres. If the jury believed Torres Hildebrandt would be convicted-if they chose not to believe him, Hildebrandt could not be convicted.

This is not a situation where any long list of legal citations is necessary. This is a case that must be decided simply on the equities. Torres clearly testified that other than taking some balls and bats when he was a youngster, he had never been arrested, let alone convicted of another crime. (T 110-111). The damaging effect in the eyes of the jury, of directly confronting Torres with such an outright lie, can not be questioned. Whether such a confrontation would have been sufficient to balance the scale against the jury believing the testimony of Torres or giving more credibility to the defense of Hildebrandt is a question which the interests of justice mandate this Court not answer.

As demonstrated above, Nicholas Hildebrandt was convicted upon the testimony of Leonard Torres. The credibility of Torres was the single most critical issue in this trial. For either defense counsel, the prosecution or even this Court to speculate on how twelve individuals would re-

act to Torres prior conviction would be to make Hildebrandt conviction a game of chance. Justice dictated that a new trial be granted.

CONCLUSION

For the reasons stated above, it is respectfully submitted that the conviction of defendant Hildebrandt should be reversed.

Respectfully submitted,

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